

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN WILSON,

Defendant-Appellant.

UNPUBLISHED

May 9, 2006

No. 261371

Wayne Circuit Court

LC No. 04-009472-01

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of 6 to 20 years for the robbery conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that trial counsel was ineffective because he failed to call an expert witness to testify about the inherent weaknesses of eyewitness testimony.

Because defendant did not raise this issue in a motion for a new trial or evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show "that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.*, p 578 (citations and internal quotation marks omitted). Defendant must also demonstrate that counsel's deficient performance "was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). He must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.*, pp 302-303 (citations and internal quotation marks omitted).

Defendant has failed to establish support for his claim of ineffective assistance of counsel. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defendant's brief includes citations and discussions of treatises and studies concerning the weaknesses of

eyewitness testimony in general. But this review of authorities is inadequate to establish that defense counsel was ineffective. Defendant has not provided an affidavit from a proposed expert applying these general principles to the circumstances of this case. Although defendant asks this Court to surmise that expert testimony would have been beneficial to his case, it is not apparent that general weaknesses in eyewitness testimony are relevant here, where the witness testified that he was familiar with defendant from having seen him several times previously. Further, it is unlikely that the evidence would have affected the verdict. Therefore, we reject this claim of error.

Defendant also argues that the trial court penalized him for exercising his right to trial because he had been offered a plea agreement that included a recommended minimum sentence of 3-1/2 years for the robbery conviction, but the court sentenced him to a minimum term of six years after trial.

We disagree with defendant's argument that the "only" possible reason for the increase in the minimum term of his sentence was his decision to exercise his right to trial. At the time the plea offer was made, there were discussions suggesting that the sentencing guidelines could be scored "as low as forty-two months." Ultimately, however, defendant's sentencing guidelines range was determined to be 51 to 85 months.

"Unless there is something in the record which indicates the higher sentence was imposed as a penalty for the accused's assertion of his right to trial by jury, the sentence imposed will be sustained." *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987); see also *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985). Because nothing in the record supports defendant's assertion that he was punished for exercising his right to trial, he is not entitled to resentencing.

Affirmed.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot